Michael Joseph Carvalho & Anor v Majlis Peguam Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02(A)-1697–09 OF 2021
HAS ZANAH MEHAT, VAZEER ALAM AND NORDIN HASSAN JJCA
15 AUGUST 2022

Legal profession — Breach of trust — Claim for compensation — Advocate and solicitor failed to make payment of stakeholder sums — Advocate and solicitor found guilty by Advocates & Solicitors Disciplinary Board (Disciplinary Board) and was stuck of the Roll — Disciplinary Board ordered advocate and Solicitor to make restitution for stakeholder sums — Failure by Advocate and Solicitor to comply with order — Claim for compensation of losses from Compensation fund — Bar Council rejected claim based on 'Guidelines On Making A Claim For Compensation' ('Guidelines') and advocate and solicitor who was at breach was practicing as partner and not sole proprietor — High Court affirmed findings of Bar Council — Appeal against decision of High Court — Whether para 2(b) of Guidelines was ultra vires provisions of Legal Profession Act 1976 — Whether s 111 of Legal Profession Act 1976 applied to protect Bar Council from any action or legal proceedings

The appellants and their two other siblings had a beneficial interest in their parent's house in Ipoh ('property'). The property was sold to Kawan Properties Sdn Bhd at the sale price of RM2,524,410. Shan Theivanthiran ('Shan') who at the material time was an advocate and solicitor practicing as a partner in the firm of Messrs Thevin Chandran & Assoc acted for the appellants and their two siblings in that sale transaction. A cheque for the sum of RM2,145,748.50, being the balance purchase price, was forwarded by the purchaser's solicitors to Messrs Thevin Chandran & Associates. In due course, that cheque was cleared, and payment was received by Messrs Thevin Chandran & Associates. Each of the four beneficiaries, including the appellants were to receive RM521,427 as their share of the balance purchase price. The appellants lodged a complaint to the Advocates & Solicitors Disciplinary Board ('Disciplinary Board') against Shan for professional misconduct occasioned by his dishonesty, ie failure to make payment of the stakeholder sums of RM521,427 to each of the appellants. After due inquiry, the Disciplinary Board found Shan guilty of professional misconduct and was struck off the Roll of Advocates and Solicitors of the High Court in Malaya ('Roll'). The Disciplinary Board further ordered that Shan make restitution in the sum of RM521,427 to each of the appellants. Shan, however, failed to comply. The appellants then wrote to the respondent and if the appellants were entitled to be compensated for their loss from the Compensation Fund. The respondent replied in the negative based on the 'Guidelines On Making A Claim For Compensation' ('Guidelines') issued by

the respondent, and the sole reason given for the respondent's refusal to entertain the appellants' claim was that Shan was at the material time practicing as a partner and not sole proprietor. Aggrieved by that decision, the appellants filed an originating summons ('OS') challenging the respondent's decision. The primary contention of the appellants was that the Guidelines issued by the respondent, and in particular the respondent's imposition of the condition that only losses arising from dishonesty of advocates and solicitors who carried on practice as sole proprietors would be covered under the Compensation Fund, were ultra vires the provisions of the Legal Profession Act 1976 ('the LPA'), and were discriminatory, unjustified, unreasonable and void. The High Court, nevertheless, found that the appellants' appeal had no merit and that the respondent had acted within its powers under s 80 of the LPA in rejecting the appellants' claim. Accordingly, the High Court dismissed the appellants' OS. Hence, the present appeal. The issues that arose for determination were: (a) whether the Guidelines, in particular para 2(b), was ultra vires the provisions of the LPA; and (b) whether s 111 of the LPA applied to protect the respondent from any action or legal proceedings instituted by the appellants, including the filing of the OS.

Held, allowing appeal; setting aside decision of High Court:

(1) The legislative purpose of the compensation fund was to relieve and mitigate any loss suffered by victims of acts of dishonesty committed 'on the part of any advocate and solicitor or any clerk or servant of an advocate and solicitor in connection with that advocate and solicitor's practice in Malaysia as an advocate and solicitor, or in connection with any trust of which that advocate and solicitor is a trustee'. Thus, the ambit of s 80(8) and (9) of the LPA was rather wide and it covers all advocates and solicitors. The legislative intent and purpose in enacting s 80 of the LPA were one of public interest, particularly to protect the interests of the public who suffer loss arising out of the dishonest conduct of advocates and solicitors (see paras 30–31).

(2) From the wordings of s 80(8) and (9) of the LPA, it was very clear that the ambit of the sections cover losses arising from the acts of dishonesty of not only advocates and solicitors who had a valid practicing certificate but also those who did not. And further it covers the acts of dishonesty of even clerks and servants of an advocate and solicitor. The net was cast wide. There was no restriction in s 80(8) and (9) of the LPA limiting payment only to losses arising from dishonesty of advocates and solicitors who were sole proprietors. Section 80(8) and (9) did not make any distinction in that regard to disallow a claim for loss arising from the dishonest act of an advocate and solicitor in a partnership practice, such as Shan (see para 33).

(3) The respondent did not have such powers to issue the Guidelines and whittle down the ambit of s 80(8) and (9) of the LPA and restrict the claims only to acts of dishonesty of advocates and solicitors who were sole proprietors. In fact, the respondent did not have powers to issue any guidelines in the nature of the Guidelines at all. In order to issue such guidelines, there must be express provision in the LPA authorising the respondent to issue them. However, there was no such express power found in the LPA. Thus, it was manifestly clear from the words of s 80(8) and (9), that the victim of any dishonest act of an advocate and solicitor, or his clerk or servant, whether the advocate and solicitor was practicing as sole proprietor or in partnership with others, or whether the advocate and solicitor had a valid practicing certificate at the material time, may make a claim from the compensation fund for any loss suffered by him from that act of dishonesty (see paras 35–36 & 39).

(4) The Guidelines of the respondent could not override the broad ambit of the provisions in s 80(8) and (9) of the LPA and impose restrictions, or narrow the category of advocates and solicitors whose dishonesty comes within the purview of these provisions of the statute. Thus, para 2(b) of the Guidelines was ultra vires the provisions LPA, and the reliance by the respondent on the Guidelines to reject the appellants' claim for compensation from the compensation fund on the sole ground that Shan at the material time was not practicing as a sole proprietor was manifestly unreasonable, irrational and unlawful. The respondent was clearly acting ultra vires its powers under the LPA in imposing a restrictive condition to limit payments out of the compensation fund to only losses arising from the dishonest act of a sole proprietor (see para 40).

(5) Section 111 of the LPA was not applicable to the facts of this case. On the facts of the case, the purpose of the OS was not one of assigning any liability to the respondent but rather one of challenging the decision of the respondent in respect of their rejection of the appellants' claim for compensation from the Compensation Fund. This was a decision in respect of the administration and management of the Compensation Fund, by which the appellants were aggrieved. The relief sought in the OS were all in respect of the appellants' rights to seek compensation from the Compensation Fund, in order to remedy and mitigate their loss arising from the dishonesty of Shan, an advocate and solicitor. If the respondent was allowed to rely on s 111 of the LPA as a shield and bar any proceedings to challenge their decision rejecting the appellants' claim, then it would mean that the respondent's decision would be absolute and beyond legal scrutiny. And that could not be the intent and purpose of s 111 of the LPA (see paras 43–45).

(6) The act of the respondent in arriving at a decision vide an ultra vires act, could not be shielded by applying s 111 of the LPA. If this was allowed,

it would mean that the court was condoning an ultra vires act of the respondent and shield it from the court's scrutiny. An act done outside the powers and ambit of the LPA could not be protected from scrutiny by reference to s 111 of the Act (see para 46).

(7) The appellants had shown that they have suffered loss from the dishonest act of Shan, who was at the material time an advocate and solicitor. The Disciplinary Board had found Shan guilty of professional misconduct and in particular the breach of undertaking to release the balance purchase price due to the appellants. This was a clear act of dishonest conduct as an advocate and solicitor, and the Disciplinary Board ordered Shan struck off the Roll. The Disciplinary Board had also ordered Shan to make restitution in the sum of RM521,427 to each of the appellants within one month of the order, which Shan failed to do. Hence, the appellants have proved that they have suffered loss in the sum of RM521,427 each and that they were entitled to payment from the Compensation Fund to mitigate their loss as provided in s 80(8) of the LPA. Thus, the appellants had a meritorious claim in the OS. In the circumstance, High Court had erred in law and in fact in dismissing the appellants' claim for the various relief contained in the OS. The High Court's decision was plainly wrong and appellate intervention was warranted (see paras 47 & 49).

[Bahasa Malaysia summary

Perayu dan dua lagi adik-beradik mereka mempunyai kepentingan ke atas rumah ibu bapa mereka di Ipoh ('hartanah tersebut'). Hartanah tersebut dijual kepada Kawan Properties Sdn Bhd dengan harga jualan RM2,524,410. Shan Theivanthiran ('Shan') yang pada masa material merupakan peguam bela dan peguam cara dan rakan kongsi di firma Tetuan Thevin Chandran & Assoc bertindak bagi perayu dan dua adik beradik mereka dalam transaksi penjualan tersebut. Cek berjumlah RM2,145,748.50, sebagai harga belian baki, telah dimajukan oleh peguam cara pembeli kepada Tetuan Thevin Chandran & Associates. Kemudiannya cek itu telah ditunaikan, dan bayaran telah diterima oleh Tetuan Thevin Chandran & Associates. Setiap seorang daripada empat waris termasuk perayu akan menerima RM521,427 sebagai bahagian mereka daripada harga pembelian baki. Perayu membuat aduan kepada Lembaga Tatatertib Peguambela & Peguamcara ('Lembaga Tatatertib') terhadap Shan atas salah laku profesional disebabkan ketidakjujurannya, iaitu kegagalan membuat pembayaran jumlah wang pemegang taruh sebanyak RM521,427 kepada setiap perayu. Selepas siasatan dilakukan, Lembaga Tatatertib mendapati Shan bersalah atas salah laku profesional dan disingkirkan daripada Senarai Daftar Peguambela dan Peguamcara Mahkamah Tinggi Malaya ('Senarai Daftar'). Lembaga Tatatertib selanjutnya memerintahkan Shan membayar ganti rugi sebanyak RM521,427 kepada setiap perayu. Shan, bagaimanapun, gagal mematuhi perintah tersebut. Perayu kemudian menulis

kepada responden samada perayu berhak mendapat pampasan bagi kerugian mereka daripada Tabung Wang Pampasan. Responden tidak membenarkannya berdasarkan 'Garis Panduan Membuat Tuntutan Pampasan' ('Garis Panduan') yang dikeluarkan oleh responden, dan alasan tunggal yang diberikan adalah Shan pada masa material beramal sebagai rakan kongsi dan bukan pemilik tunggal. Terkilan dengan keputusan itu, perayu memfailkan saman pemula ('SP') untuk mencabar keputusan responden. Hujah utama perayu ialah Garis Panduan yang dikeluarkan oleh responden, dan khususnya syarat responden terhadap kerugian yang timbul daripada ketidakjujuran peguam bela dan peguam cara yang beramal sebagai pemilik tunggal akan dilindungi di bawah Tabung Wang Pampasan, adalah ultra vires dengan peruntukan Akta Profesion Undang-Undang 1976 ('APU'), dan ianya merupakan satu diskriminasi, tidak wajar, tidak munasabah dan tidak sah. Bagaimanapun, Mahkamah Tinggi mendapati rayuan perayu tidak mempunyai merit dan responden telah bertindak menurut bidang kuasanya di bawah s 80 APU dalam menolak tuntutan perayu. Sehubungan itu, Mahkamah Tinggi menolak SP perayu. Oleh itu, rayuan ini difailkan. Isu-isu yang timbul untuk penentuan adalah: (a) sama ada Garis Panduan, khususnya perenggan 2(b), adalah ultra vires dengan peruntukan APU; dan (b) sama ada s 111 APU melindungi responden daripada sebarang tindakan atau prosiding undang-undang yang dimulakan oleh perayu, termasuk pemfailan SP ini.

Diputuskan, membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi:

(1) Tujuan undang-undang mengenai tabung wang pampasan adalah untuk memudahkan dan mengurangkan sebarang kerugian yang dialami oleh mangsa akibat perbuatan tidak jujur yang dilakukan oleh 'mana-mana peguam bela dan peguam cara atau mana-mana kerani atau pekerja peguam bela dan peguam cara berkaitan dengan amalan peguam bela dan peguam cara itu di Malaysia sebagai peguam bela dan peguam cara, atau berkaitan dengan apa-apa amanah yang mana peguam bela dan peguam cara itu adalah pemegang amanah'. Oleh itu, s 80(8) dan (9) APU agak luas dan ianya meliputi semua peguam bela dan peguam cara. Niat dan tujuan perundangan dalam menggubal s 80 APU adalah antaranya untuk kepentingan awam, terutamanya untuk melindungi kepentingan orang ramai yang mengalami kerugian akibat perbuatan tidak jujur peguam bela dan peguam cara (lihat perenggan 30–31).

(2) Peruntukan s 80(8) dan (9) APU adalah sangat jelas bahawa ianya meliputi kerugian yang timbul akibat perbuatan tidak jujur bukan sahaja peguam bela dan peguam cara yang mempunyai sijil amalan yang sah tetapi juga mereka yang tidak mempunyainya. Ia juga meliputi tindakan ketidakjujuran kerani dan pekerja peguam bela dan peguam cara tersebut. Perlindungannya adalah secara menyeluruh. Tiada sekatan di dalam s 80(8) dan (9) APU yang mengehadkan pembayaran hanya

kepada kerugian yang timbul daripada ketidakjujuran peguam bela dan peguam cara yang merupakan pemilik tunggal. Seksyen 80(8) dan (9) tidak mempunyai sebarang perbezaan dalam hal itu untuk tidak membenarkan tuntutan kerugian yang timbul akibat perbuatan tidak jujur seorang peguam bela dan peguam cara dalam amalan perkongsian, seperti Shan (lihat perenggan 33).

(3) Responden tidak mempunyai kuasa untuk mengeluarkan Garis Panduan dan mengenepikan anggapan s 80(8) dan (9) APU dan menolak tuntutan tersebut hanya kepada perbuatan tidak jujur peguam bela dan peguam cara yang merupakan pemilik tunggal. Malah, responden tidak mempunyai kuasa untuk mengeluarkan sebarang panduan seperti Garis Panduan tersebut sama sekali. Untuk mengeluarkan garis panduan tersebut, perlu ada peruntukan nyata di dalam APU yang memberi kuasa kepada responden untuk berbuat sedemikian. Walau bagaimanapun, tidak ada kuasa nyata yang terdapat di dalam APU tersebut. Oleh itu, peruntukan s 80(8) dan (9) adalah jelas bahawa mangsa sebarang tindakan tidak jujur peguam bela dan peguam cara, atau kerani atau pekerjanya, sama ada peguam bela dan peguam cara beramal sebagai pemilik tunggal atau dengan perkongsian, atau sama ada peguam bela dan peguam cara mempunyai sijil amalan yang sah pada masa material, boleh membuat tuntutan daripada Tabung Wang Pampasan untuk sebarang kerugian yang dialami olehnya daripada perbuatan tidak jujur tersebut (lihat perenggan 35–36 & 39).

(4) Garis panduan responden tidak dapat mengatasi peruntukan luas di dalam s 80(8) dan (9) APU dan mengenakan sekatan, atau menyempitkan kategori peguam bela dan peguam cara yang ketidakjujurannya berada dalam bidang kuasa peruntukan ini. Oleh itu, perenggan 2(b) Garis Panduan adalah ultra vires peruntukan APU, dan pergantungan oleh responden terhadap Garis Panduan untuk menolak tuntutan perayu untuk pampasan atas alasan bahawa Shan pada masa material tidak beramal sebagai pemilik tunggal adalah jelas tidak munasabah, tidak wajar dan menyalahi undang-undang. Responden jelas telah bertindak ultra vires daripada kuasanya di bawah APU dengan mengenakan syarat terhad untuk pembayaran pampasan kepada hanya kerugian yang timbul daripada perbuatan tidak jujur pemilik tunggal (lihat perenggan 40).

(5) Seksyen 111 APU tidak terpakai berdasarkan fakta kes ini. Berdasarkan fakta kes, tujuan SP bukanlah untuk mengenakan sebarang liabiliti kepada responden tetapi lebih kepada mencabar keputusan responden berkenaan penolakan tuntutan perayu untuk pampasan daripada Tabung Wang Pampasan. Ini adalah keputusan berkenaan dengan pentadbiran dan pengurusan Tabung Pampasan, yang mana perayu terkilan. Relif yang dipohon dalam SP ini adalah berkenaan dengan hak perayu untuk

mendapatkan pampasan daripada Tabung Wang Pampasan, untuk memampas dan mengurangkan kerugian mereka akibat ketidakjujuran Shan, seorang peguam bela dan peguam cara. Sekiranya responden dibenarkan bergantung kepada s 111 APU sebagai perisai dan menghalang sebarang prosiding untuk mencabar keputusan mereka menolak tuntutan perayu, maka ini bermakna keputusan responden adalah mutlak dan di luar penelitian undang-undang. Hal ini bercanggah dengan tujuan s 111 APU (lihat perenggan 43–45).

(6) Tindakan responden dalam mencapai keputusan ini adalah satu tindakan yang ultra vires dan tidak boleh dilindungi dibawah s 111 APU. Sekiranya ini dibenarkan, ini bermakna mahkamah membenarkan tindakan ultra vires responden dan melindunginya daripada penelitian mahkamah. Sesuatu perbuatan yang dilakukan di luar bidang kuasa dan kuasa APU tidak boleh dilindungi menurut s 111 Akta tersebut (lihat perenggan 46).

(7) Perayu telah menunjukkan bahawa mereka telah mengalami kerugian akibat perbuatan Shan yang tidak jujur, yang pada masa itu seorang peguam bela dan peguam cara. Lembaga Tatatertib telah mendapati Shan bersalah atas salah laku professional, khususnya pelanggaran aku janji untuk melepaskan baki harga belian yang perlu dibayar kepada perayu. Ini adalah tindakan yang jelas merupakan satu perbuatan tidak jujur sebagai peguam bela dan peguam cara, dan Lembaga Tatatertib mengarahkan Shan digugurkan dari Senarai Daftar. Lembaga Tatatertib juga memerintahkan Shan membayar ganti rugi sebanyak RM521,427 kepada setiap perayu dalam tempoh sebulan daripada perintah tersebut, yang mana ianya gagal dibayar oleh Shan. Oleh itu, perayu telah membuktikan bahawa mereka telah mengalami kerugian dalam jumlah RM521,427 setiap seorang dan mereka berhak dibayar oleh Tabung Wang Pampasan untuk mengurangkan kerugian mereka seperti yang diperuntukkan dalam s 80(8) APU. Oleh itu, perayu mempunyai tuntutan yang bermerit menurut SP tersebut. Dalam keadaan itu, Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta ketika menolak tuntutan perayu untuk pelbagai relif di dalam SP tersebut. Keputusan Mahkamah Tinggi adalah jelas salah dan campur tangan rayuan dibenarkan (lihat perenggan 47 & 49).]

Cases referred to

Dato Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong [1986] 2 MLJ 112; [1986] 1 CLJ 377; [1986] CLJ Rep 89, SC (refd)

Hartaya Sdn Bhd (receiver and manager appointed) & Ors v Malayan Banking Bhd & Ors [2010] 7 MLJ 200, HC (refd)

Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals [1997] 3 MLJ 23, CA (refd)

Langkawi Holiday Villa Sdn Bhd lwn Kesatuan Kebangsaan Pekerja-Pekerja

Hotel, Bar dan Restoran, Semenanjung Malaysia dan satu lagi [2020] MLJU 1135; [2020] 1 LNS 1187, HC (refd)
Michael Joseph Carvalho dan satu lagi lwn Majlis Peguam Malaysia [2021] MLJU 2963; [2022] 6 CLJ 570, HC (refd)
Perbadanan Kemajuan Negeri Pahang v Bar Malaysia (unreported), HC (refd)
Shangri-La Hotel (KL) Bhd & Ors v National Wages Consultative Council & Ors [2018] 9 MLJ 773; [2017] 1 LNS 657, HC (refd)

Legislation referred to

Advocates and Solicitors Compensation Fund Rules 1978
Legal Profession Act 1976 ss 3, 80, 80(2), (8), (9), (12), 111

Appeal from: *Michael Joseph Carvalho dan satu lagi lwn Majlis Peguam Malaysia* [2021] MLJU 2963 (High Court, Ipoh)

Subashini Gunasegaran (with Baljeet Kaur) (VT Singam, D Gunasegaran & Co) for the appellant.
Savithiri Ganesan (Savi Ganesan & Co) for the respondent.

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellants claimed for compensation from the Advocates and Solicitors Compensation Fund ('Compensation Fund') established under the Legal Profession Act 1976 ('the LPA'). The respondent informed the appellants that they were ineligible to make their claim, and thus refused to consider the appellants' application. The appellants then appealed that decision to the High Court vide an originating summons.

[2] The High Court found that the appellants' appeal had no merit and that the respondent had acted within its powers under s 80 of the LPA in rejecting the appellants' claim. Accordingly, the High Court dismissed the appellants' appeal.

[3] The appellants' appealed that decision to this court. We allowed the appeal for the following reasons.

BACKGROUND FACTS

[4] The appellants and their two other siblings had beneficial interest in their parents' house in Ipoh ('property'). The property was sold to Kawan Properties Sdn Bhd at the sale price of RM2,524,410.

[5] Shan a/l Theivanthiran ('Shan') who at the material time was an advocate and solicitor practicing as a partner in the firm of Messrs Thevin Chandran & Associates acted for the appellants and their two siblings in that sale transaction.

[6] On 2 May 2014, a cheque for the sum of RM2,145,748.50, being the balance purchase price, was forwarded by the purchaser's solicitors to Messrs Thevin Chandran & Associates. In due course, that cheque was cleared and payment was received by Messrs Thevin Chandran & Associates.

[7] Each of the four beneficiaries, including the appellants were to receive RM521,427 as their share of the balance purchase price. Shan then drew out two Public Bank Bhd cheques dated 17 March 2016 each for the sum of RM521,427 in the respective names of the appellants and gave them to the appellants. However, Shan subsequently notified the appellants not to cash the cheques until he notified them to do so.

[8] On 31 March 2016, Shan deposited a cheque in the sum of RM1,042,854 into the first appellant's Maybank account, which was the total payment due to the appellants. However, Shan then instructed his bank to stop payment on the said cheque.

[9] Shan, and by extension the firm of Messrs Thevin Chandran & Associates, failed to make payment of the sum of RM1,042,854 to the appellants despite repeated assurance that it would be paid.

[10] The appellants then lodged a complaint to the Advocates & Solicitors Disciplinary Board ('Disciplinary Board') against Shan for professional misconduct occasioned by his dishonesty, ie failure to make payment of the stakeholder sums of RM521,427 to each of the appellants.

[11] After due inquiry, the Disciplinary Board found Shan guilty of professional misconduct and by order dated 18 July 2020 ordered that Shan be struck off the Roll of Advocates and Solicitors of the High Court in Malaya ('Roll').

[12] The Disciplinary Board further ordered that Shan make restitution in the sum of RM521,427 to each of the appellants within one month from the date of the order. Shan, however, failed to comply with that order.

[13] The appellants through their solicitors then wrote to the respondent via email dated 21 September 2020 informing the respondent of the order and further enquired if the appellants were entitled to be compensated for their loss from the Compensation Fund.

[14] The respondent via email dated 22 September 2020 replied in the negative and stated as follows:

> We regret to inform you that *the Bar Council is unable to entertain any claim made against Shan A/L Theivanthiran as he was practicing as a partner* in Messrs Theivin Chandran & Assoc. Please find attached herewith the Compensation Fund brochure that provides the guideline in relation to eligibility.
>
> In the circumstances, kindly advise your client on the remedies available in respect of Shan A/L Theivanthiran. (Emphasis added)

[15] The respondent's decision was based on the 'Guidelines On Making A Claim For Compensation' ('Guidelines') issued by the respondent, and the sole reason given for the respondent's refusal to entertain the appellants' claim was that Shan was at the material time practicing as a partner and not sole proprietor. As to who were eligible to make a claim from the Compensation Fund, para 2 of the Guidelines stipulated as follows:

> (2) Eligibility and Procedure
>
> Any person who has sustained losses owing to the dishonesty of lawyers may apply for a grant out of the Compensation Fund under these circumstances:
>
> (a) the lawyer concerned was struck off the Roll of advocates and solicitors by an Order of the Disciplinary Board in the preceding year and there is no appeal pending;
>
> (b) *the lawyer concerned was practicing as a sole proprietor at the material time of the breach* and
>
> (c) no out-of-court settlement or agreement has been entered into between the claimant and the lawyer concerned. (Emphasis added.)

[16] Aggrieved by that decision, the appellants filed the originating summons challenging the respondent's decision of 22 September 2020. The primary contention of the appellants is that the Guidelines issued by the respondent, and in particular the respondent's imposition of the condition that only losses arising from dishonesty of advocates and solicitors who carried on practice as sole proprietors would be covered under the Compensation Fund, were ultra vires the provisions of the LPA, and were discriminatory, unjustified, unreasonable and void.

[17] The appellants, inter alia, sought declaratory orders from the High Court to the effect that:

(a) the respondents restrictive conditions on eligibility to claim from the Compensation Fund as contained in para 2(b) the Guidelines was in conflict with the provisions of s 80(2), 80(8) and 80(9) of the LPA and

(b) the respondent's refusal to consider payment of compensation to the appellants from the Compensation Fund on grounds that Shan was not practicing as sole proprietor at the material time was ultra vires and/or in excess of the statutory powers of the respondent under the LPA and is therefore a nullity, void and/or of no effect.

[18] The respondent opposed the appellant's contention and argued that the conditions imposed in the Guidelines are not ultra vires and are well within the statutory powers conferred under the LPA.

THE HIGH COURT'S DECISION

[19] The learned High Court judge held that the appellant's originating summons had no merits and found that the respondent had acted within the statutory powers provided in s 80 of the LPA, and that pursuant to s 80(12) of the LPA the respondent had powers to make rules regarding the Compensation Fund, including the Guidelines. The High Court's judgment is reported as *Michael Joseph Carvalho dan satu lagi lwn Majlis Peguam Malaysia* [2021] MLJU 2963; [2022] 6 CLJ 570.

[20] Hence, the learned High Court judge held that the appellants did not fulfil the criteria laid down in the Guidelines and that the appellants knew from the Guidelines that they were not qualified to apply for compensation under the Compensation Fund. In arriving at that decision the learned High Court judge had referred to the case of *Perbadanan Kemajuan Negeri Pahang v Bar Malaysia* (unreported judgment of the High Court Kuantan in 2003) on the interpretation of s 80 of the LPA.

ISSUES IN THIS APPEAL

[21] The crucial issues in this appeal are:

(a) whether the Guidelines, in particular para 2(b), is ultra vires the provisions of the LPA; and

(b) whether s 111 of the LPA applies to protect the respondent from any action or legal proceedings instituted by the appellants, including the filing of the originating summons.

The answer to these questions will resolve the related issue of whether the refusal of the respondent to consider the appellants' claim for compensation from the Compensation Fund is correct in law.

Evaluation of submissions of counsel

[22] The respondent submitted that it had acted pursuant to the provisions of the LPA in respect of the appellants' claim for compensation and that they had exercised their powers and discretion under s 80 of the LPA including the procedure to be adopted for all claims for compensation made from the Compensation Fund.

[23] Learned counsel for the respondent further submitted that the Bar Council is empowered under s 80(12) of the LPA to make rules in respect of the procedure to be followed for any claims and payment out of the compensation. In this regard, the Bar Council has in exercise of that power laid down the procedure and set out the rules as found in the Advocates and Solicitors Compensation Fund Rules 1978 ('the CF Rules') in respect of any claims and payment out from the Compensation Fund.

[24] Learned counsel for the respondent added that pursuant to s 80(12) of the LPA and the CF Rules, the Bar Council had issued the Guidelines to be complied with by claimants making any claim for payment from the Compensation Fund. Thus the respondent contends that the criteria set out in the Guidelines, particularly para 2(b) on a claimant's eligibility to make a claim, is not ultra vires its statutory powers.

[25] Hence, the respondent took the position that the imposition of the condition in para 2(b) of the Guidelines that only claims for losses arising from dishonesty of advocates and solicitors practicing as sole proprietors will be covered under the Compensation Fund is well within its powers, and therefore submitted that the High Court was correct in dismissing the appellants' originating summons.

[26] The learned counsel for the appellants, of course, takes a contrary position, and argues otherwise.

Are the Guidelines ultra vires the LPA?

[27] Section 3 of the LPA defines 'Compensation Fund' to mean the fund maintained and administered by the respondent in accordance with s 80 of the LPA. Hence, the Compensation Fund is a statutory fund established under s 80(1) of the LPA which provides that:

> (1) The Malaysian Bar shall maintain and administer in accordance with this section a fund to be known as the 'Compensation Fund'.

[28] The law mandates that every advocate and solicitor shall make an

annual contribution to the compensation as provided in s 80(2) of the LPA that reads:

> (2) Every advocate and solicitor shall on each occasion he applies for a Sijil Annual pay to the Malaysian Bar a contribution of such sum as the Bar Council may from time to time determine and the Malaysian Bar shall pay that contribution into the Fund:
>
> Provided that an advocate and solicitor who applies for a Sijil Annual shall be required to pay only half the contribution so determined if the practising certificate for which he proposes to apply is valid for less than six months.

Thus, every advocate and solicitor when applying for a Sijil Annual shall pay an annual contribution to the Compensation Fund, the amount of which shall be determined by the Bar Council. This annual contribution together with any investment earnings from the monies in the fund constitutes the entire Compensation Fund.

[29] The purpose of the Compensation Fund is stipulated in s 80(8) and (9) of the LPA, which provides:

> (8) Where it is proved to the satisfaction of the Bar Council that any person has sustained loss in consequence of dishonesty on the part of any advocate and solicitor or any clerk or servant of an advocate and solicitor in connection with that advocate and solicitor's practice in Malaysia as an advocate and solicitor, or in connection with any trust of which that advocate and solicitor is a trustee, then subject to this section, the Malaysian Bar may, if the Bar Council thinks fair and reasonable, makes a grant to that person out of the Fund for the purpose of relieving or mitigating that loss.
>
> ...
>
> (9) A grant may be made under this section whether or not the advocate and solicitor had a valid practising certificate when the act of dishonesty was committed, and notwithstanding that subsequent to the commission of the act the advocate and solicitor has died or had his name removed from or struck off the Roll or has ceased to practise or been suspended from practice.

[30] Hence, the legislative purpose of the Compensation Fund is to relieve and mitigate any loss suffered by victims of acts of dishonesty committed 'on the part of any advocate and solicitor or any clerk or servant of an advocate and solicitor in connection with that advocate and solicitor's practice in Malaysia as an advocate and solicitor, or in connection with any trust of which that advocate and solicitor is a trustee'. Thus, the ambit of s 80(8) and (9) of the LPA is rather wide and it covers all advocates and solicitors.

[31] The Parliamentary Debates as reflected in the Hansard dated 18 December 1975 in respect of the relevant Bill tabled for reading that eventually led to the Legal Profession Act showed that the legislative intent and

purpose in enacting s 80 of the LPA was one of public interest, particularly to protect the interests of the public who suffer loss arising out of the dishonest conduct of advocates and solicitors.

[32] It must be further noted that pursuant to s 80(9) of the LPA, a 'grant may be made under this section whether or not the advocate and solicitor had a valid practising certificate when the act of dishonesty was committed' and notwithstanding the fact that the advocate and solicitor may have been struck off the Roll subsequent to the act of dishonesty.

[33] Hence, from the wordings of s 80(8) and (9) of the LPA it is very clear that the ambit of the sections cover losses arising from the acts of dishonesty of not only advocates and solicitors who had a valid practicing certificate but also those who did not. And further it covers the acts of dishonesty of even clerks and servants of an advocate and solicitor. The net is cast wide. It is pertinent to note that there is no restriction in s 80(8) and (9) of the LPA limiting payment only to losses arising from dishonesty of advocates and solicitors who were sole proprietors. Section 80(8) and (9) do not make any distinction in that regard to disallow a claim for loss arising from the dishonest act of an advocate and solicitor in a partnership practice, such as Shan.

[34] Now, to facilitate the administration of the Compensation Fund, s 80(12) of the LPA provides that:

> (12) The Council may make rules in respect of the procedure to be followed in giving effect to this section and in respect of any matters incidental, ancillary or supplemental thereto or concerning the administration or protection of the Fund.

Pursuant to that statutory power, the Bar Council had made the CF Rules, which we have set out below in full for ease of reference:

> In exercise of the powers conferred by subsection (12) of section 80 of the Legal Profession Act 1976 [Act 166], the Bar Council makes the following rules:
>
> 1. Citation
>
> These Rules may be cited as the Advocates and Solicitors' Compensation Fund Rules 1978.
>
> 2. Contribution to be paid annually in advance
>
> Contribution to the Compensation Fund for the succeeding year shall be paid annually in advance by each advocate and solicitor on application by him for a Sijil Annual.
>
> 3. Notice on Form A
>
> Before or at the time of making an application to the Bar Council for a grant out of the Compensation Fund, an applicant shall complete, sign and deliver to the Secretary of the Bar Council a notice in Form A set out in the Schedule or in a form to the like effect approved by the Bar Council.

4. Notice to be delivered to Secretary

Every such notice shall be delivered to the Secretary of the Bar Council within six months (or such other period not exceeding two years as the Bar Council may allow) after the loss in respect of which the notice is delivered, first come to the knowledge of the applicant.

5. Notice to accompany an application

Every such notice shall be accompanied by an application for a grant out of the Compensation Fund, except where it is impracticable to deliver the application with the notice, in which case the application shall be delivered to the Secretary of the Bar Council as soon as practicable after the delivery of the notice.

6. Application in Form B

Every application shall be made in Form B set out in the Schedule or in a form to the like effect approved by the Bar Council. The Bar Council may require an applicant to make a statutory declaration in support of his application.

7. Bar Council may require oral evidence of documents

The Bar Council may require an application to be supported by oral evidence to be tendered and documents to be produced to the Bar Council or any Committee appointed and authorised by the Bar Council to exercise or to assist the Bar Council in the exercise of its functions under section 80 of the Act.

8. Bar Council may require pursuit of civil remedy or criminal proceeding

The Bar Council may before deciding whether or not to make a grant out of the Compensation Fund require, in respect of any application, the pursuit of any civil remedy which may be available in respect of the loss, or the institution of criminal proceedings in respect of the dishonesty leading to the loss, or the making of an application to a Disciplinary Committee.

9. Waiver

The Bar Council may waive any of the provisions of these Rules or permit the amendment of any notice or application.

10. Requirement of Bar Council to be communicated by notice

Any requirement of the Bar Council under these Rules may be communicated by a notice in writing which may be delivered personally or sent by post to the addressee at his last known address. Any such notice sent by post shall be deemed to have been received by the addressee within forty-eight hours (excluding Sundays and Public Holidays) of the time of posting.

SCHEDULE

FORM A — NOTICE OF LOSS

FORM B — FORM OF APPLICATION FOR A GRANT OUT OF THE COMPENSATION FUND

(SCHEDULE OF PARTICULARS TO BE ANNEXED TO FORM A OR B)

This Schedule should contain the following information which should be given concisely numbered paragraph:

1. The circumstances in which and the date or dates on which the money or other property, in respect of which the loss incurred came into the possession of the solicitor or his clerk or servants.
2. Full particulars of the money or property.
3. The facts relied upon in support of the allegation of dishonesty or failure to account.
4. The circumstances in and the date on which the loss first came to the knowledge of the applicant.
5. Particulars of any relevant documents which can be produced in support of this application.
6. Whether it is known that any other application is likely to be made in respect of the facts set out in this schedule.
7. Whether any civil, criminal or disciplinary proceedings have or will be taken in respect of the facts set out in this application. If proceedings have already been taken give the result.
8. The name and address of any solicitor instructed on behalf of the applicant.
9. Any other relevant particulars.

[35] Having scrutinized the provisions of s 80(8) and (9) of the LPA and the CF Rules, we do not find any provision therein that gives the respondent the power to issue any guidelines restricting the application of the provisions in s 80(8) and (9) of the LPA, and make it applicable only to the dishonesty of a certain class of advocates and solicitors, ie sole proprietors. It is our considered view that the respondent does not have such powers to issue the Guidelines and whittle down the ambit of s 80(8) and (9) of the LPA and restrict the claims only to acts of dishonesty of advocates and solicitors who are sole proprietors.

[36] In fact, we found that the respondent does not have powers to issue any guidelines in the nature of the Guidelines at all. In order to issue such guidelines there must be express provision in the LPA authorising the respondent to issue them. However, there is no such express power found in the LPA. See: *Shangri-La Hotel (KL) Bhd & Ors v National Wages Consultative Council & Ors* [2018] 9 MLJ 773; [2017] 1 LNS 657; *Langkawi Holiday Villa Sdn Bhd lwn Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran, Semenanjung Malaysia dan satu lagi* [2020] MLJU 1135; [2020] 1 LNS 1187; *Hartaya Sdn Bhd (receiver and manager appointed) & Ors v Malayan Banking Bhd & Ors* [2010] 7 MLJ 200; *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23 (CA).

[37] At best, the respondent can only make rules pursuant to s 80(12) of the LPA, and that too for the limited purposes stated therein, which is in respect of

A procedure for making a claim from the Compensation Fund. Such rules must be confined to procedural matters and cannot affect substantive rights of parties. And in any event such rules cannot override the express provisions of the LPA being the parent statute which is the statutory source that contains the enabling provision for the issuance of the rules.

B

[38] This principle was made clear by Abdoolcader SCJ in *Dato Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong* [1986] 2 MLJ 112; [1986] 1 CLJ 377; [1986] CLJ Rep 89 in the following terms:

C

> *This legislative provision clearly relates to a matter of practice and procedure with no question arising of creating or altering substantive rights or of any rules made pursuant thereto purporting per se to confer jurisdiction where none existed otherwise*, and it is this specific enactment in the 1964 Act that enables the necessary rules to be spelt out to regulate the procedure for the purposes specified therein. (Emphasis added.)

D

[39] Thus, it is manifestly clear from the words of s 80(8) and (9) that the victim of any dishonest act of an advocate and solicitor, or his clerk or servant, whether the advocate and solicitor was practicing as sole proprietor or in partnership with others, or whether the advocate and solicitor had a valid E practicing certificate at the material time, may make a claim from the Compensation Fund for any loss suffered by him from that act of dishonesty.

[40] The Guidelines of the respondent cannot override the broad ambit of the provisions in s 80(8) and (9) of the LPA and impose restrictions, or narrow F the category of advocates and solicitors whose dishonesty comes within the purview of these provisions of the statute. Thus, we found that para 2(b) of the Guidelines was ultra vires the provisions LPA, and the reliance by the respondent on the Guidelines to reject the appellants' claim for compensation from the Compensation Fund on the sole ground that Shan at the material G time was not practicing as a sole proprietor is manifestly unreasonable, irrational and unlawful. The respondent was clearly acting ultra vires its powers under the LPA in imposing a restrictive condition to limit payments out of the Compensation Fund to only losses arising from the dishonest act of a sole proprietor.

H

APPLICATION OF S 111 OF THE LPA

[41] Learned counsel for the respondent further relied on s 111 of the LPA which provided that no action shall lie against the Malaysian Bar or the Bar I Council in respect of anything done unless it can be proved that it was done in bad faith. In this regard, once again counsel has referred to the High Court case of *Perbadanan Kemajuan Negeri Pahang v Bar Malaysia*. The learned High Court judge had accepted this argument and in doing so had also referred to the same High Court decision.

[42] Now, s 111 of the LPA provides:

> 111 No action against Disciplinary Committee, etc. for act done
>
> No action or proceeding shall lie against the Disciplinary Committee, the Disciplinary Board, the Malaysian Bar, the Bar Council or any State Bar Committee or any member thereof for any act or thing done under this Act including any pronouncement or publication of any decision of the Disciplinary Board unless it is proved to the Court that the act or thing was done in bad faith or with malice.

[43] We are of the considered view that s 111 of the LPA is not applicable to the facts of this case. Section 111 would be a bar against any action or proceeding against the Malaysian Bar or the Bar Council if by that action or proceeding it is sought to make the Malaysian Bar or the Bar Council liable for their act, ie where legal liability of some sort is sought to be imposed and where for example damages are sought, unless it can be shown that the decision was made in bad faith or with malice.

[44] Here, the purpose of the originating summons is not one of assigning any liability to the respondent but rather one of challenging the decision of the respondent in respect of their rejection of the appellants' claim for compensation from the Compensation Fund. This was a decision in respect of the administration and management of the Compensation Fund, by which the appellants were aggrieved. The relief sought in the originating summons are all in respect of the appellants' rights to seek compensation from the Compensation Fund, in order to remedy and mitigate their loss arising from the dishonesty of Shan, an advocate and solicitor.

[45] If the respondent is allowed to rely on s 111 of the LPA as a shield and bar any proceedings to challenge their decision rejecting the appellants' claim, then it would mean that the respondent's decision would be absolute and beyond legal scrutiny. And that cannot be the intent and purpose of s 111 of the LPA. The respondent is a statutory body and the exercise of statutory powers are justiciable and open to scrutiny of the courts. The respondent's exercise of discretion under s 80 of the LPA must be done in accordance to the law and is not unfettered. An act of the respondent done ultra vires the powers conferred under the LPA cannot be construed as an 'act or thing done under this Act' for it to be accorded the protection contained in s 111 of the LPA. Thus, a person aggrieved by that decision of the respondent can challenge and question it in a court of law.

[46] In any event, the act of the respondent in arriving at a decision vide an ultra vires act, cannot be shielded by applying s 111 of the LPA. If we were to allow that, it would mean that the court is condoning an ultra vires act of the respondent, and shield it from the court's scrutiny. Surely an act done outside the powers and ambit of the LPA cannot be protected from scrutiny by

reference to s 111 of the Act. To that extent we found that the High Court's interpretation and application of s 111 of the LPA in *Perbadanan Kemajuan Negeri Pahang lwn Bar Malaysia* was wrong.

CONCLUSION

[47] In this case, the appellants have shown that they have suffered loss from the dishonest act of Shan, who was at the material time an advocate and solicitor. The appellants had lodged a complaint with the Disciplinary Board against Shan and he was found guilty of professional misconduct and in particular the breach of undertaking to release the balance purchase price due to the appellants. This was a clear act of dishonest conduct as an advocate and solicitor, and the Disciplinary Board ordered Shan struck off the Roll. The Disciplinary Board had also ordered Shan to make restitution in the sum of RM521,427 to each of the appellants within one month of the order, which Shan failed to do. Hence, the appellants have proved that they have suffered loss in the sum of RM521,427 each. The appellants have clearly shown that they were entitled to payment from the Compensation Fund to mitigate their loss as provided in s 80(8) of the LPA. Thus, the appellants had a meritorious claim in the originating summons.

[48] In the circumstance, we found that the High Court had erred in law and in fact in dismissing the appellants' claim for the various relief contained in the originating summons. The High Court's decision is plainly wrong and appellate intervention is warranted. Thus, we allowed the appeal and set aside the order of the High Court.

[49] In consequence thereof, we made the following orders:

(a) a declaration that para 2(b) of the Guidelines is ultra vires the provisions in s 80(2), 80(8) and 80(9) of the LPA;

(b) a declaration that the respondent's refusal to consider payment out of the Compensation Fund to the appellants to mitigate their loss suffered as a result of the dishonest act of Shan, an advocate and solicitor, is unreasonable and irrational and was ultra vires and/or in excess of the statutory powers of the respondent under the LPA and is therefore a nullity, void and/or of no effect;

(c) that the appellants shall in accordance to the procedure in the CF Rules resubmit an application to the respondent within 60 days of date hereof and the respondent shall consider the appellants' aforesaid application for compensation for their loss suffered and shall make an appropriate award of compensation from the Compensation Fund using the same formula for payment for the year in question, which is the year 2020;

(d) costs of RM10,000 here and below to the appellants subject to allocatur; and

(e) parties are at liberty to apply to the High Court.

Appeal allowed.

Reported by K Selvaraju